

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANGEL A. GARCÍA-ALVAREZ,

Defendant.

Criminal No. 06-198 (JAF)

**OPINION AND ORDER**

On August 18, 2006, Defendant Angel A. García-Alvarez ("García-Alvarez") was found guilty of carjacking while using a firearm. Docket Document No. 55. García-Alvarez now moves for a new trial based on allegedly newly-discovered evidence that, he asserts, substantiates his alibi with a high degree of accuracy and is likely to result in his acquittal upon retrial. Docket Document No. 71. The United States opposes. Docket Document No. 79. For the reasons stated below, we deny Defendant's motion.

**I.**

**Background**

Unless otherwise indicated, the following facts are based on the parties' filings. Docket Document Nos. 71, 79.

García-Alvarez was indicted on June 21, 2006, and arraigned a week later on June 28, 2006. The charges brought against García-Alvarez arose out of a carjacking that took place on April 12, 2006 at an

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1 apartment building in Condado, Puerto Rico, between the hours of 9:00  
2 a.m. and 12:00 Noon.

3 At a status conference held on July 21, 2006, the court  
4 scheduled trial for the first week of August 2006. The trial date  
5 was then extended to August 14, 2006, after the defense stated that  
6 it needed more time to prepare for trial. The main theory of the  
7 defense was that García-Alvarez had an alibi and, therefore, this was  
8 a case of mistaken identity. García-Alvarez' alibi was that he was  
9 delivering furniture in Carolina, Puerto Rico, the morning of the  
10 crime. During the trial, the jury heard testimony in support of his  
11 alibi from one of García-Alvarez' employees, as well as the person  
12 who received the furniture delivery. The defense argued that this  
13 testimony established García-Alvarez' alibi. The government  
14 stipulated to the fact that García-Alvarez delivered furniture to  
15 this particular customer on the morning of the crime, but asserted  
16 that he made this delivery in an attempt to establish his alibi after  
17 he committed the crime. On August 18, 2006, after the close of all  
18 of the evidence, the jury returned a verdict of guilty on all counts.  
19 Docket Document No. 55.

20 On February 13, 2007, García-Alvarez moved for a new trial on  
21 the basis of allegedly newly-discovered evidence in the form of  
22 testimony and analysis performed by engineers of Centennial, the cell  
23 phone company that provided service to the cell phones that were  
24 allegedly used by García-Alvarez and his employee on April 12, 2006.

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1     Docket Document No. 71. That morning, García-Alvarez, who has a  
2     furniture delivery business, brought furniture to a residence in  
3     Carolina with one of his employees. They traveled to the residence  
4     in separate vehicles and took different routes but were in regular  
5     communication via cell phone throughout the morning. Both cell  
6     phones were in García-Alvarez' name.

7             The proffered evidence contains an analysis of the billing codes  
8     cited in García-Alvarez' cell phone records that purportedly  
9     pinpoints the general physical location of García-Alvarez' cell phone  
10    in reference to Centennial transmission facilities every time a call  
11    was made or received from it on the morning of the crime. Generally,  
12    every time a person makes or receives a call from a cell phone using  
13    Centennial's service, the call is picked up by a specific antenna, or  
14    "cell site," that is located in the nearest part of the island where  
15    the cell phone is physically located. The location of the cell site  
16    for each call appears as a billing code in each customer's cell phone  
17    records. After the engineers at Centennial deciphered the codes in  
18    García-Alvarez' records, their analysis showed that most of the calls  
19    that were made and received from the cell phone that was allegedly in  
20    García-Alvarez' possession on the morning of the crime were handled  
21    by cell sites in Carolina. According to the engineers, this means

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1 that García-Alvarez' cell phone was, to a high degree of certainty,  
2 located in Carolina during the entire commission of the crime.<sup>1</sup>

3 At trial, the government did not dispute that García-Alvarez  
4 made the furniture delivery on the morning of April 12, 2006; rather,  
5 it asserted that he made the delivery after he committed the crime.  
6 García-Alvarez now urges the court to grant a new trial based on the  
7 newly-obtained evidence, asserting that it would show that he was in  
8 Carolina during, and not just after, the commission of the crime, and  
9 would, therefore, likely result in an acquittal upon retrial. On  
10 March 9, 2007, the United States opposed García-Alvarez' motion for  
11 a new trial. Docket Document No. 79.

## 12 II.

### 13 Motion for New Trial Standard

14 Rule 33 of the Federal Rules of Criminal Procedure states in  
15 pertinent part that "[u]pon the defendant's motion, the court may  
16 vacate any judgment and grant a new trial if the interest of justice  
17 so requires." FED. R. CRIM. P. 33(a) (2007). "The standard for  
18 granting a motion for a new trial is quite high." United States v.  
19 Genao-Sanchez, 208 F. Supp. 2d 130, 134 (D.P.R. 2002); see also  
20 United States v. Ortiz-Miranda, 931 F. Supp. 85, 92 (D.P.R.

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<sup>1</sup>The Western part of the Municipality of Carolina adjoins the Eastern part of the Municipality of San Juan. Both locations are close to each other. The Luis Muñoz Marín International Airport, for example, is in Carolina, and only a few yards away from the Municipality of San Juan.

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1 1996)(stating that the requirements of Rule 33 are extremely  
2 stringent).

3 A motion for new trial on the basis of newly-discovered evidence  
4 will not be granted unless the defendant can demonstrate that  
5 "(1) the evidence was unavailable or unknown at the time of trial;  
6 (2) the defendant's failure to uncover the evidence earlier was not  
7 due to a lack of diligence; (3) the tendered evidence is material and  
8 not simply impeaching or cumulative; and (4) the new evidence will  
9 probably result in an acquittal if the defendant is retried." United  
10 States v. George, 448 F.3d 96, 101 (1st Cir. 2006). The defendant  
11 bears the burden of establishing each of these requirements. "If any  
12 of the four factors are lacking, then a Rule 33 motion must be  
13 denied." United States v. Falu-Gonzalez, 205 F.3d 436, 442 (1st Cir.  
14 2000)(quotations omitted).

15 **III.**

16 **Legal Analysis**

17 García-Alvarez asserts that the court should order a new trial  
18 on the basis of newly-discovered evidence in the form of testimony  
19 and analysis performed by engineers of Centennial because this  
20 evidence would "allow for a finding with a very high degree of  
21 certainty that at times where the alleged offense in this case was  
22 occurring, the defendant was physically located in the municipality  
23 of Carolina and not in the [adjoining San Juan] Condado area," where  
24 the crime occurred. Docket Document No. 71. According to García-

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1 Alvarez, a new trial is warranted because each of the prongs of the  
2 test for a new trial have been met, namely (1) the evidence was  
3 unavailable or unknown at the time of trial; (2) his failure to  
4 uncover the evidence earlier was not due to a lack of diligence;  
5 (3) the evidence is material and not simply impeaching or cumulative;  
6 and (4) the new evidence will probably result in an acquittal if he  
7 is retried. Id.

8 **A. First Two Prongs: Evidence Was Unavailable or Unknown At Trial**  
9 **& It Could Not Have Been Uncovered With Due Diligence**

10 García-Alvarez has moved for a new trial on the basis of "newly  
11 discovered evidence." Docket Document No. 71. "[C]ourts have given  
12 a narrow meaning to the phrase 'newly discovered,' holding that the  
13 defendant must demonstrate not only that the evidence was unknown or  
14 unavailable at the time of the trial, but also that failure to learn  
15 of the evidence was not due to lack of due diligence by the  
16 defendant." United States v. Lema, 909 F.2d 561, 566 (1st Cir.  
17 1990) (quotations omitted). "Due diligence requires that a defendant  
18 exert some effort to discover the evidence." United States v.  
19 Jaramillo, 42 F.3d 920, 925 (5th Cir. 1995); see also United States  
20 v. Lombardi, 524 F. Supp. 182, 185 (E.D.N.Y. 1981) (stating that "at  
21 the very least some effort" is required to show due diligence).

22 Here, García-Alvarez admits that he had custody of at least some  
23 aspects of the "newly discovered evidence" prior to the trial.  
24 Docket Document No. 71. He states that, "[d]uring the investigation

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1 for the instant case, the defense was able to obtain [his] . . .  
2 phone records . . . which contain[ed] all the information regarding  
3 the date, time and phone numbers of the persons called by [his] . . .  
4 cellular telephones." Id. These records also contained the billing  
5 codes that Centennial's cell phone engineers used to pinpoint the  
6 physical location of García-Alvarez' cell phone on the morning of the  
7 crime. Id.

8 However, García-Alvarez states that these records were not  
9 introduced into evidence at trial because they were "either  
10 irrelevant or never in dispute," and the defense decided to establish  
11 García-Alvarez' alibi through other means, including testimony of  
12 witnesses and other documentary evidence. Id. García-Alvarez also  
13 asserts that "the defense never anticipated that the theory of the  
14 government would be that [García-Alvarez] took affirmative steps,  
15 concerted in advance, to create his own alibi in anticipation of  
16 potential prosecution," which "the government advanced toward the end  
17 of its case in chief [on] the fourth day of trial." Id. The defense  
18 states that it was only after they learned of the government's theory  
19 and after García-Alvarez was convicted that "it became completely  
20 relevant and important to decipher the billing codes . . . in hopes  
21 that such codes would reveal a specific location from where the phone  
22 calls were made or received in an attempt to accurately position the  
23 defendant at the time of the offense." Id. The defense waited until  
24 after the trial was over to subpoena the cell phone engineers at

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1 Centennial to request that they "explain the billing codes and  
2 whether it was at all possible to give a description of the physical  
3 location of the defendant using the phone records as a guide." Id.

4 These arguments are unpersuasive. We are focused here on the  
5 first two prongs of the test for a new trial, which require proof  
6 that the evidence was unavailable or unknown to Defendant at trial  
7 and could not have been discovered with due diligence. See United  
8 States v. George, 448 F.3d 96, 101 (1st. Cir. 2006). García-Alvarez'  
9 decision to forego further investigation into the usefulness of the  
10 cell phone records in lieu of other evidence that helped substantiate  
11 his alibi is not sufficient to satisfy either of these prongs. By  
12 García-Alvarez' own admission, the evidence was in his possession  
13 before and during trial. Docket Document No. 71. García-Alvarez  
14 should have explored every means of substantiating his alibi,  
15 particularly since it was the primary theory of his defense. The fact  
16 that García-Alvarez failed to appreciate the significance of his cell  
17 phone records and waited until after the trial to analyze them  
18 demonstrates a lack of diligence on his part. See, e.g., United  
19 States v. Villarreal, 324 F.3d 319, 326 (5th Cir. 2003) (finding that  
20 defendant was not sufficiently diligent where the new evidence  
21 proffered consisted of details in a video that was introduced at  
22 trial and which would have been visible had the tape been played more  
23 slowly); United States v. Alessi, 638 F.2d 466, 479 (2d Cir.  
24 1980) (finding that defendant was not sufficiently diligent in



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1 attempting to obtain a letter, the existence of which he had been  
2 aware of at trial); United States v. Pappas, 602 F.2d 131, 133-34  
3 (7th Cir. 1979) (concluding that defendants' failure to appreciate the  
4 significance of evidence that was in their possession prior to trial  
5 showed a lack of diligence).

6 García-Alvarez further contends that he could not obtain the  
7 proffered evidence earlier because of the "circumstances of this case  
8 prior to or during the trial." Docket Document No. 71. He asserts  
9 that there was not enough time to perform an adequate investigation  
10 and fully develop the evidence because the trial was scheduled three  
11 weeks after García-Alvarez' arraignment and the government failed to  
12 turn over discovery materials until four days before the trial. Id.

13 These arguments fail as well. García-Alvarez never informed the  
14 court that he needed additional time to analyze his cell phone  
15 records. Moreover, García-Alvarez asserted that he did not understand  
16 the relevance and usefulness of an analysis of his cell phone records  
17 until well into the trial and after the trial was over. Id. It is,  
18 therefore, unlikely that García-Alvarez would have more diligently  
19 examined and analyzed the cell phone records that were in his  
20 possession if he had more time to prepare for trial. García-Alvarez  
21 also failed to explain how the government's delay in turning over  
22 discovery material prevented him from conducting a thorough analysis  
23 of his cell phone records.

